No. 12,363

IN THE

United States Court of Appeals

For the Ninth Circuit

YOUNG BROTHERS, LIMITED, Claimant of the Tug "Kolo", her boats, engines, machinery, tackle, etc.,

Appellant,

vs.

JOHN CHO,

Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

J. GARNER ANTHONY,
WILLIAM F. QUINN,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Proctors for Appellee.

ROBERTSON, CASTLE & ANTHONY,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Of Counsel.

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OPINION BELOW.

The District Court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 25-28.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii over this cause in admiralty rests upon Title 28, United States Code, Section 1333.

The jurisdiction of this Court is founded upon Title 28, United States Code, Section 1291.

PROCEEDINGS BELOW.

On October 12, 1948, John Cho, appellee herein, libelled the tug Kolo, her boats, engines, machinery, tackle, etc., in an admiralty cause for negligent towage (R. 2-6). A stipulation for libellant's costs was filed, a monition for the arrest of the vessel issued, claim of owner Young Brothers, Limited, appellant herein, filed, together with a bond for the release of the vessel, all on October 12, 1948 (R. 7, 9, 11, 13). After answer of claimant, filed on November 5, 1948 (R. 14-19), the case came on for hearing on April 25 and 26, 1949. At the conclusion of the case, briefs were filed and the case was argued. Thereafter, claimant obtained leave to introduce additional evidence. Upon the termination of the new evidence, the court rendered his decision in favor of libellant John Cho and against the tug Kolo (R. 25-28). Pursuant thereto, a decree that libellant recover from the tug Kolo the sum of $8,609.12, with interest until paid, was entered on June 8, 1949 (R. 29). Notice of appeal was filed on June 18, 1949 (R. 30).

STATEMENT OF FACTS.

On April 3, 1948 (R. 43), the Tenyo Maru, an Oil Screw Sampan, length 48.1 feet, breadth 10.7 feet, depth 5 feet, and net tonnage 9 (Ex. 1; R. 158), owned by John Cho, appellee, went aground on a reef off the island of Molokai, in the Hawaiian Islands, while on a commercial fishing voyage (R. 76). The captain of the Tenyo Maru at the time was Sam Kalani, Jr. (R. 51). He had a crew of two men (R. 54, 66). After notification on April 4, John Cho and his sister went to appellant Young Brothers, Limited, a salvage company, owner and claimant of the tug Kolo, respondent in the District Court. They talked to Captain Pavao, port captain of Young Brothers (R. 76) or to Mr. O'Neill, assistant port captain (R. 204). While they were at the Young Brothers' office seeking aid (R. 92) Mr. Edward Harrison, vice-president and manager of Young Brothers, was called on the telephone (R. 94), and John Cho requested assistance in salvaging his sampan (R. 76-77; 95). Joe Kahiapo, whom Cho had never met before (R. 98), employed by Young Brothers as master of the tug Kolo, came to the office while Cho and his sister were there (R. 76; 118). The Kolo was scheduled to go to Molokai the following morning (R. 76, 118). Arrangements were made for Cho to meet the tug Kolo at Kaunakakai, Molokai, on the following afternoon at 2:00 p.m. (R. 77, 93, 96, 120); Kahiapo was ordered to salvage the sampan—to do what he could for it (R. 76, 84, 92, 120, 127, 131). Kahiapo was admittedly inexperienced, this being his first salvage job (R. 123). He took the Kolo to Molokai where he

met Cho on Monday afternoon, April 5. At that time the tide was too low for the Kolo to be of any assistance to the grounded sampan, so Kahiapo took her to the harbor of Kolo where he was to work with a larger Young Brothers tug, the Mahoe, in taking pineapple barges in and out of the harbor (R. 132, 133). The captain of the Mahoe, Ching Ho, had been ordered by Young Brothers to proceed from Kolo to Kaunakakai and to assist the tug Kolo in pulling the Tenyo Maru off the reef (R. 225). On Thursday morning, April 6, while the Kolo stood by at the harbor of Kolo, the Mahoe went to Kaunakakai and viewed the grounded sampan. Ching Ho, the captain of the Mahoe, gave Cho some line and told him to prepare the Tenyo Maru to be towed off the reef. The Mahoe returned to the harbor of Kolo to pick up another pineapple barge brought out to her by the Kolo, and then the Kolo and Mahoe proceeded back to Kaunakakai, arriving there about 4:00 p.m. on Tuesday, April 6 (R. 133, 230). After an unsuccessful effort by the Kolo to pull the sampan off the reef by herself, the Mahoe secured a line to the Kolo, and the two tugs pulled the sampan off the reef (R. 231, 232). The Kolo took the sampan alongside the dock at Kaunakakai (R. 232). As a result of having been on the reef, the hull planking of the sampan was smashed and she was leaking through an area one and one-half feet long by three inches wide (R. 61, 78, 249). The damage was in a location below the water line where it could not be repaired either from the inside or the outside (R. 78). During the night of April 6, while the sampan was in the harbor, pumps

aboard the sampan were able to keep up with the leakage (R. 82). An attempt was made the following morning, Wednesday, April 7, to lift the sampan so that repairs could be made with the only serviceable crane at Kaunakakai harbor, but the sampan was too heavy (R. 267).

The Mahoe left Molokai about 6:30 p.m. on Tuesday night. Before he left, the captain of the Mahoe told Cho that he should call Young Brothers' home office if he wanted the Tenyo Maru towed to Honolulu (R. 236). Kahiapo told Ching Ho before the Mahoe left that he was going to tow the sampan to Honolulu, and Ching Ho said nothing (R. 135-139). Kahiapo considered it part of his job to take the sampan to a place where it could be fixed (R. 141). Captain Pavao, Young Brothers' port captain, likewise considered that a vessel isn't salvaged until it is taken to a port where it can be repaired (R. 257). After the Mahoe left, Kahiapo told Cho that a call to Young Brothers was unnecessary because towing the Tenyo Maru to Honolulu was already part of his responsibility (R. 81, 108).

The Kolo took the Tenyo Maru in tow at about noon on April 7 (R. 55). Sometime after the tug and tow entered Molokai channel about 1:45 p.m. (Interrogatories 3 and 6, R. 6, 20), the pumps aboard the sampan could no longer keep up with the water coming in (R. 56). Thereafter spray stopped the gasoline motor of the motor-driven pumps and the sampan gradually filled until it was submerged to the gunwales (R. 57, 72). The Kolo made no attempt to tow her in this

position (R. 126). Instead, the tug master, inexperienced and frightened, backed to within 20 feet of the sampan, taking up his towline, cut the line, and took the crew of the sampan aboard his tug, despite the advice of an experienced crew member on the tug that the line should not be cut because the sampan was floating (R. 144, 149, 150, 154). The tug left the partially submerged sampan in Molokai channel and returned to Honolulu (R. 149, 57).

An expert testified that Hawaiian sampans such as the Tenyo Maru do not normally sink (R. 201) and two experts stated that they did not know of any sampans lost by sinking (R. 201, 330). The expert called by appellant testified that the partially submerged sampan being towed astern would create little danger to the tug (R. 322). He told of other partially submerged sampans that had been towed to safety (R. 328, 329). A fisherman stated that his own sampan, much like the Tenyo Maru, had been badly damaged below the water line and had been towed to safety (R. 164). Captain Holm, appellant's expert, stated that the Tenyo Maru, if new, would float without question, and that wood four years old receiving normal care would retain its positive buoyancy (R. 326, 327). He attributed the precipitous action of the tug master to his inexperience (R. 318, 332), and thought that it could be explained by the fact that competent and experienced tug masters might demand too high pay for small tugs (R. 333).

The value of the sampan at the time of loss was estimated to be between $8,000 and $9,000 (R. 194).

Repairs due to the damage suffered by the sampan on the reef prior to her loss were estimated to cost $600 to $650 (R. 197). Judgment was awarded to appellee in the amount of $8,000, together with interest and costs (R. 28), the district court finding that the master of the tug Kolo failed to exercise the care and skill required of him when he cut the Tenyo Maru adrift in Molokai channel and abandoned her, and that this negligence was the sole proximate cause of the loss of the sampan (R. 27).

QUESTIONS PRESENTED.

1. Should the findings of the trial judge, supported by the evidence, that the tug master's negligence was the sole cause of the loss of the Tenyo Maru be disturbed?

2. Has appellant carried its burden of proving that the owner or crew of the Tenyo Maru were negligent and that their negligence contributed to the loss of the sampan?

3. Can a master in lawful possession and control of a tugboat render the vessel liable *in rem* for the maritime tort of negligent towage irrespective of his authority to take vessels in tow?

SUMMARY OF ARGUMENT.

The findings of the trial judge who heard all the testimony and is best able to determine credibility and resolve conflicts in inferences to be drawn therefrom should not be disturbed unless clearly erroneous. Findings which are supported by evidence in the record are not clearly erroneous. The findings of the trial judge are supported by the evidence and should not be disturbed.

The actions of the master of the tug Kolo were manifestly negligent. The evidence shows that no emergency situation existed when the towline was cut and the sampan abandoned. Abandonment casts the burden of justifying the action upon the tug. Appellant failed to prove any justification. Although the owner of the Tenyo Maru might have been negligent in allowing his unseaworthy boat to be taken in tow, the trial court found that the unseaworthiness and John Cho's negligence were not the cause of the loss of the sampan. This finding is amply supported in the record.

The actions of the captain of the Tenyo Maru after the tow was undertaken, and after the abandonment of the sampan, raise no inference of negligence contributing to the loss of the sampan and were properly disregarded by the trial court.

Negligent towage is a maritime tort creating a maritime lien in the offending vessel. American admiralty law, in creating the maritime lien as a *jus in re,* personifies the vessel as the tort feasor irrespective of the authority of her master and crew so long as the person in control has lawful possession. This applies

whether the tort is negligent or wilful, and whether it is negligent towage or some other kind of wrongful action.

Negligent towage gives rise to a cause of action against, and a lienor's interest in, the offending vessel whether or not a contract of towage exists between the tow and the tug, and despite the fact that the owner of the tug may not be personally liable.

ARGUMENT.

I. THE FINDING OF THE DISTRICT JUDGE THAT THE PRECIPITOUS CUTTING ADRIFT AND ABANDONMENT OF THE TENYO MARU WAS NEGLIGENCE IS AMPLY SUPPORTED BY EVIDENCE AND SHOULD BE SUSTAINED.

A. Findings of fact of the Trial Court who heard the witnesses should not be disturbed.

While it is sometimes said that an appeal in admiralty is a trial *de novo,* it is universally held that the findings of a trial court on testimony and evidence taken in his presence should not be disturbed whenever they find support in the evidence adduced.[1] The appellant failed to introduce evidence to contradict the facts shown by appellee with respect to the unnecessary abandonment of the Tenyo Maru in Molokai channel. Nevertheless appellant seeks to have this court draw different inferences from the evidence than those drawn by the court. To the extent that conflicting inferences could be drawn, the conflict was resolved by the trial court when he made his findings

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[1] *Drain v. Shipowners & Merchants Tugboat Co.*, 149 F. (2d) 845 (CCA 9th, 1945).

of fact pursuant to Admiralty Rule 46½.[2] Since the evidence supports the inferences drawn by the trial court, his findings of fact based thereon should be accepted by this court.[3] This is likewise true as to the trial court's determination that the action of the master of the Kolo was negligence, which was the sole proximate cause of the loss of the Tenyo Maru.[4] The standards of reviewability of findings of fact in admiralty are similar to those established in the Federal Rules of Civil Procedure for the review of findings of a court without a jury.[5] Applying these standards, we submit the trial court's findings are clearly supported by the evidence and in fact reflect the situation pictured by the preponderance of the evidence. Therefore, the findings and conclusions of the trial court should be affirmed.

B. The Trial Court's findings are supported by the evidence.

The findings of fact important to the determination that the master of the Kolo was negligent and that his negligence caused the loss of the Tenyo Maru are Findings (6) through (9) and appear in the record at pages 26-27.

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[2]28 U.S.C. following Sec. 723.

[3]*Stetson v. U.S.*, 155 F. (2d) 359 (CCA 9th, 1946); *Johnson v. Andrus*, 119 F. (2d) 287 (CCA 2nd, 1941).

[4]*Bornhurst v. United States*, 164 F. (2d) 789 (CCA 9th, 1947); *Virgin v. U.S.*, 165 F. (2d) 81 (CCA 4th, 1947); *Royal Exchange Assurance Co. v. Graham and Morton Transportation Co.*, 166 Fed. 32, 36 (CCA 7th, 1908).

[5]F.R.C.P., Rule 52 (a): ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ." See *Johnson v. Andrus*, supra, at p. 288.

In Finding number (6) the trial court finds that the sampan was being towed astern of the tug at the time she had taken water so that her decks were awash.[6] This fact appears in the testimony of Joseph Kahiapo, the captain of the tug Kolo. He testified that the sampan was 75 to 80 yards behind the tug when he first noticed she was riding low (R. 126). At the time he cut the towline, the sampan was about 20 feet astern of the tug (R. 144).

The trial court found that Joseph Kahiapo was an inexperienced tug master, having no prior experience in open sea towing.[7] Kahiapo's own statement affords a basis for this finding: "That was my first salvage operation, and I wouldn't say I was too experienced on that job" (R. 123).

The court found that Kahiapo's inexperience was the primary factor influencing him to cut the towline when he first saw that the sampan was low in the water. The court also found as a fact that an experienced crewman on the tug had advised Kahiapo not to cut the towline because the sampan would not sink. Ample support for these findings is contained in the testimony of Abell, the crewman on the tug, that Kahiapo was frightened and cut the line although he, Abell, told Kahiapo the sampan was floating (R. 149, 150, 154). On this question the court also had the benefit of the testimony of Captain Holm, a well qualified expert in salvage operations, that Kahiapo's lack of experience was probably the cause of his setting

[6]R. 26.
[7]R. 26, Finding No. (7).

the sampan adrift (R. 332). If he were as inexperienced, said Captain Holm, he might have done the same thing (R. 334), but knowing what he did, he would not have cut the line (R. 332). These excerpts from the record not only support the trial court's Finding number (7)—they demonstrate that no other finding was possible on the testimony before the court.

Finally, the court found that the sampan had sufficient positive buoyancy to remain afloat and that she could have been towed to Honolulu had she not been cut loose. The ship builder who had worked on the sampan in 1945 testified that they had done a major repair job on the sides, bottom and cabin of the Tenyo Maru (R. 173), costing four to five thousand dollars (R. 174). Mr. Cho, the owner of the Tenyo Maru and appellee herein, testified that from August 1946 until April 1947, the sampan was repaired regularly every three to five months, all necessary repairs being done each time (R. 185).

Captain Holm, the expert, testified that sampan wood four years old would remain positively buoyant (R. 323). He and Mr. Leary, another expert, testified that they knew of no instances when Hawaiian sampans were lost through sinking (R. 330, 200-201). Mr. Leary stated that such vessels do not normally sink (R. 198, 201). Mr. Kagimoto told of his sampan, similar to the Tenyo Maru, which was safely towed in after a collision (R. 146). Captain Holm gave instances of sampans awash and damaged below the water line which were towed to safety (R. 328-9).

When the tug left for Honolulu the Tenyo Maru was floating with the water up to her gunwales (R. 57).

As against this sturdy evidential support of the trial judge's findings, appellant suggests that the situation was in fact an emergency, with the lives of the crews of sampan and tug in the balance.[8] So it is said that the master is not at fault even if he makes a wrong choice when confronted suddenly with the necessity of making some choice. This interpretation is contrary to the evidence and, indeed, is expressly disavowed by the district court on the grounds of credibility. Thus the court says he can "hardly believe" Kahiapo's story of the rapid filling of the sampan (R. 336). So long as the sampan was being towed astern, Captain Holm expressed the opinion that there was little danger of a condition occurring so rapidly it could not be taken care of (R. 322).

It is significant that the other eye witnesses, Kalani, the master of the sampan, and Abell, the tug crewman, did not mention that the situation was touched with danger at all. Abell's only remark that concerned the question was his appraisal of Kahiapo as being "scared" (R. 154).

Appellant assigns numerous errors to the district court's findings of fact as set forth above.[9] However, the argument in support of the assignment is not directed to a showing that there was no substantial evidence to support the district court's findings, or that

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[8]Appellant's Brief, pp. 28-32.

[9]Assignments of error numbers 6, 7, 8, 9 and 11, R. 35-37; see Appellant's Brief, pp. 25-26.

such findings were "clearly erroneous." Instead, appellant attempts to have other inferences drawn from the evidence which might tend to support its claim of no negligence.

C. The findings of fact made by the Trial Court support a determination that the master of the Kolo was negligent.

The district court found that the master of the Kolo cut the Tenyo Maru adrift and abandoned her because of his inexperience (R. 26), and that such action was unnecessary because the sampan would have remained afloat and could have been towed safely to Honolulu (R. 27). The findings are supported by the evidence adduced in the presence of the court (Section I B above). Appellant argues that such facts do not prove negligence and that other facts should have been proved before negligence could be inferred. It cites cases relating to the duty imposed upon the master of a vessel in an emergency.[10]

In *The Stirling Tompkins* the tug pleaded that it had done its best in a dense fog and that the damage to one of its tows was an accident not due to any carelessness on its part. The court of appeals recognizes that so long as proper seamanship is displayed, a mere error in judgment will not be negligence. But the court, without the aid of experts, found that the tug should have but did not give appropriate signals to its auxiliary tugs. And the court said:

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[10]See *The SS Bellatrix*, 114 F. (2d) 1004 (CCA 3rd, 1940); *The Stirling Tompkins*, 56 F. (2d) 740 (CCA 2nd, 1932), cited in Appellant's Brief, pp. 29-30.

> The grounding of the tow called for an explanation. The attempted explanation was the presence of a dense fog, but the tug had to meet the prima facie proof of fault occasioned by grounding her tow by showing not only that she was in a troublesome fog, but that her master did everything that a skillful navigator should have done while in a fog to keep the tow in line . . . In our opinion, no explanation sufficient to justify the grounding has been given. (p. 742.)

In the instant case, the evidence clearly showed that in its partially submerged condition, the sampan was in no danger of sinking, and presented no danger to the tug. It could have been towed to Honolulu. If the master of the Kolo had some justification for cutting the tow adrift and abandoning her, the burden was upon Young Brothers to prove it.[11] This they have failed to do.

Arguing in terms of emergency situations is going far afield. In *The SS Bellatrix,*[12] a tug had a "dead" vessel in tow. As the tug and tow approached a drawbridge, one side of the bridge lifted fully but the other side failed to rise sufficiently to allow the vessels to pass. A squall hit at the same time. The tug went full speed astern but the tow's momentum carried it into the defective bridge leaf. It was argued that if the tug had taken different action damage might have been avoided. The court, however, held that the tug master had a right to assume the drawbridge was

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[11] *The Stirling Tompkins*, supra.
[12] 114 F. (2d) 1004 (CCA 3rd, 1940).

functioning properly and that his action in the emergency could not be challenged from a nautical standpoint. At most, it was an error in judgment.

In the above case, damage was bound to result unless the master did something; in our case, damage would not have resulted except for the action taken by the master.

There is no question that Kahiapo thought he was doing the right thing. He was frightened for the safety of his tug. He cut the tow adrift and abandoned her on the assumption that she was sinking, even though he was told the contrary by his own crewman. An honest intention to do the best he can under the circumstances will not exonerate the tug master unless it is also shown that he acted "in the exercise of the reasonable discretion of experienced navigators".[13]

Experienced navigators are charged with knowledge of "such information as is current in the calling".[14]

When the nature of anchorages is involved, a master is required to know the information disclosed by Geodetic Survey Charts.[15]

When the question arises of whether a partially-submerged sampan under tow should be abandoned or the towing continued, the tug master should be held to know that which is current in the calling, i.e., that sampans do not normally sink, and that they can be

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[13]*The Nannie Lamberton*, 85 Fed. 983 (CCA 2nd, 1898).

[14]*The Harford*, 159 F. (2d) 486 (CCA 2nd, 1947); cert. denied 331 U.S. 848 (1947).

[15]Ibid.

and have been safely towed into port when they are in that condition.

Tugs have a duty of a high degree of diligence to save a tow that has gone adrift, for to abandon it is to commit it to certain loss.[16]

Where a hawser had parted several times, and high winds had so damaged the tow that her crew boarded the tug and the tug left the tow and retreated to a protected anchorage, it was held that the action of the tug master

> showed neither good judgment, fidelity to his charge, nor that sturdy and obdurate endeavor to hold onto his tow that the law should demand under the conditions then existing.[17]

Similarly, where the tug captain thought the tow would founder, so he cut the towline, took aboard the crew of the tow and abandoned the latter, the court held that

> there was a reasonable chance that they could have been saved if the tug had resumed charge of them. Their owner was entitled to the benefit of the chance, and as he was deprived of it by the conduct of the tug, in disregard of her duty to use all reasonable efforts for the preservation of her tow, the tug must respond for the consequences, in the absence of clear proof that her efforts would have been ineffectual.[18]

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[16] *Atkinson v. Scully*, 246 Fed. 463 (1917).

[17] *In re Moran*, 120 Fed. 556, 563 (1903).

[18] *Appeal of Cahill*, 124 Fed. 63, 64 (CCA 2nd, 1903); Accord: *Maryland Transp. Co. v. Dempsey*, 279 Fed. 94 (CCA 4th, 1921); *The O. L. Halenbeck*, 110 Fed. 556 (1901); *The Bronx*, 14 F. (2d) 482 (1926).

Appellant argues that the towline had to be cut in order to save the crew of the sampan.[19] The master of the Kolo testified that the sampan went down rapidly and the crew was clinging to the submerged part of the cabin (R. 124). He also said the crew was signalling for the tug to come back to pick them up (R. 143). Appellant places considerable reliance on this testimony. However, the trial court apparently placed little credence in the emergency situation painted by Kahiapo (R. 336). Kalani, the captain of the sampan, testified that the water was right below the gunwale (R. 56) and that no part of the main deck was under water (R. 72). He testified that he signalled the tug that he was taking on water and that the pump had stopped (R. 56, 68), and that all the master of the tug did was to cut the towline (R. 57). Abell, the crewman on the tug, testified that the sampan sank down to about the level of the deck (R. 149). He did not describe any emergency with respect to the personnel on board the sampan. We submit that the record fails to justify the inference which appellant attempts to draw.

Appellant has not shown that the crew of the sampan could not have been taken off while the towline was still holding to the sampan, although it is shown that the tug master didn't cut the line until the sampan was only twenty feet away (R. 144) and that the crew of the sampan swam to the tug after the line was cut (R. 57).

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[19]Appellant's Brief, pp. 31-33.

The burden of showing that nothing further could be done to aid the sampan was on the tug, after the abandonment of the floating sampan was proved by its owner.[20] The record supports the finding that the sampan would float and could be towed to Honolulu. Nevertheless, appellant argues that the actions of the tug master could not be the proximate cause of the loss of the sampan because it is not proved that she floated for five minutes after she was abandoned.[21]

However, it is clearly established in the law of negligent towage that if fault of the tug is established, as it was here, then the tug must affirmatively show that the failure to take proper measures to save the tow did not in fact cause the damage.[22] Once salvage is shown to be probable, the burden is on the tug to show that further towing would have been useless.[23] The tug Kolo and her claimant have not, and can not, make such a showing in this case.

Even if the circumstances had justified the captain of the Kolo in cutting the towline and taking the crew of the sampan aboard, he was not justified in deserting the tow or making no further efforts to save her.[24]

Appellant seeks to justify the desertion of the sampan by pointing to the fact that the evidence does not disclose any objection to his course of action by the

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[20] *In re Moran*, supra; *Appeal of Cahill*, supra; *The O. L. Halenbeck*, supra.

[21] Appellant's Brief, p. 31.

[22] *The Betty*, 278 Fed. 220 (1922).

[23] *The O. L. Halenbeck*, supra.

[24] *Appeal of Cahill*, supra; *The O. L. Halenbeck*, supra.

captain of the sampan. The evidence does not show, in the first place, that the captain of the sampan signalled to be taken off the sampan, as contended by appellant. Secondly, and of greater significance, the tug cannot by such assertions shift its duties to its tow.

Naturally, if the tug cuts a line and signals the crew to get off it will comply. As was pointed out in *In re Moran*,[25] the fact that the crew left the tow doesn't justify desertion. The tug has dominion over the tow. The arbitrary power of the tug master is known. What he directed to be done would be accepted without dissent by the crew of the tow.

This reasoning applies equally to the alleged desire of the crew of the sampan to leave their ship and to the failure of the sampan's captain to object to the tug's abandonment of his ship.

The Asher J. Hudson,[26] cited by appellant, does not require that the master of the sampan express an opinion that his ship would not sink. There it was clearly shown that the crew of both the tug and the tow reasonably believed the tow would sink. In the instant case, there is no evidence of what the crew of the tow thought would occur. There is evidence that the captain of the tug thought his tug was endangered, and there is evidence from a crew member of the tug and from experts that the sampan would

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[25]120 Fed. 556 (1903). The crew of the tow apparently asked to be taken aboard the tug.

[26]154 Fed. 354 (CCA 2nd, 1907); Appellant's Brief, p. 32.

not sink. To cast the tow loose when there was no immediate danger of its sinking and no danger to the tug, was blatant disregard of the property rights of the owner who had entrusted his vessel to the care of the tug. The tug master's belief was not a reasonable one but was based upon, and was found by the trial court to be based upon, his inexperience as a tug master.

Appellant having failed to carry the burden of proving that the abandonment of the Tenyo Maru by the Kolo was justified, the trial court properly found on the facts that the tug master did not exercise the care and diligence required of a prudent tug master to save his tow.

D. The evidence supports the Trial Court's determination that the negligence of the tug master was the sole proximate cause of the loss of the Tenyo Maru.

It is stated that negligence of the owner and crew of the sampan Tenyo Maru contributed to her loss so that appellee must bear a part of the damages suffered by him.[27] This assertion is based upon the owner of the sampan's knowledge of her unseaworthiness at the commencement of the tow, and upon the appellant's interpretation of the evidence that the crew of the sampan was negligent in failing to give proper signals and in failing to take affirmative action to prevent the abandonment of the sampan.

We agree with the proposition that if the tow is lost due to her unseaworthiness, known both to her

[27]Appellant's Brief, pp. 34-41.

owner and to the tug master, then each vessel is responsible for the loss and appellee can only recover a portion of his damages against the Kolo.[28]

However, the district court, while finding that the Tenyo Maru was unseaworthy and that this was known to John Cho and to the tug master, went on to find that this unseaworthiness was not the cause of the sampan's loss (R. 27). This finding, though it might be considered one of ultimate fact, will not be set aside unless it clearly appears that it is either unsupported by the evidence or against the evidence.[29]

The evidence supporting the trial judge's findings that the sampan would have floated and could have been towed to Honolulu is reviewed above.[30] From the evidence and the findings it is apparent that the loss was caused not by the sampan's unseaworthiness, but by the tug master's utter neglect of his duties after the sampan had taken water to the extent that she was down to her gunwales. That a tow is unseaworthy is no justification for her abandonment. The tug carries the burden of taking reasonable and prudent action to protect an unseaworthy tow from loss.[31] The wrongful abandonment of the tow having been shown, it was incumbent upon the Kolo to demonstrate that

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[28]*Mason v. The Steam-Tug "William Murtaugh"*, 3 Fed. 404 (1880); *The Bordentown*, 16 Fed. 270 (1883).

[29]*Royal Exchange Assurance Co. v. Graham and Morton Transportation Co.*, 166 Fed. 32, 36 (CCA 7th, 1908).

[30]Section I B above.

[31]*Du Bois Sons Co. v. Penn. R. Co.*, 47 F. (2d) 172 (CCA 2nd, 1931); see *McCormick v. Jarrett*, 37 Fed. 380 (1889); *Wilson v. Sibley*, 36 Fed. 379, 383 (1888).

further efforts would have been fruitless.[32] Appellant failed to carry this burden.

Assuming that the sampan sank in the water to the level of the gunwales due to her unseaworthiness, presumably this would have occurred irrespective of any signals from the tow to the tug. Signalling was wholly unconnected with the loss which occurred. The acts of the Kolo complained of took place after signals were given (R. 56). Furthermore, the master of the Kolo established a system of signals with the tow which amounted merely to his waving to the tow every half hour (R. 141). And Kalani, the captain of the Tenyo Maru, testified that the tug master did not respond to his signals given after the ship was down in the water (R. 57) and apparently didn't even see them (R. 56).

Appellant does not suggest what intelligence the sampan could have communicated to the tug by signalling before the gas pump stopped, in view of the incomplete signalling procedure set up by the tug. When a tug undertakes a tow and supplies the motive power—

> she becomes the dominant mind, and the tow is required to follow directions from the tug.[33]

If the tug failed to make adequate provision for signalling, the fault lies with the tug and is negligence chargeable to her.[34]

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[32] *Appeal of Cahill*, 124 Fed. 63 (CCA 2nd, 1903).

[33] *The Benning*, 44 F. Supp. 645, 648 (1942); *The Express*, 8 Fed. Cas. 171, No. 4209, 3 Cliff. 462 (1871).

[34] Cf. *The Stirling Tompkins*, 56 F. (2d) 740 (1932).

We submit that signalling from tow to tug in the period before the Tenyo Maru was abandoned was properly disregarded by the district court in determining liability for the loss of the sampan, because faulty signalling did not cause the loss and because the fault, if any, in the signalling is attributable to the tug.

Appellant suggests that the lack of any evidence on the attitude of Kalani toward the abandonment of the sampan demonstrates that he did not take adequate steps to save her and is therefore equally responsible for her loss.[35]

The burden of proving negligence of the sampan's crew contributing to her loss was on appellant.[36] The admission that the record is silent as to Kalani's claim is sufficient to preclude the question not urged below from being considered by this court. Inferences cannot be drawn from the silent record that Kalani did not object, any more than the lack of testimony proves that he did. Appellant has failed to carry the burden of proof on this matter.

In any event, the failure of the sampan's captain to argue with "the dominant mind" of the tug is not negligence and could not have caused the loss or increased the damage suffered by appellee.[37] Whatever the tug master directed be done would be accepted without question by the sampan's crew.[38] He gave

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[35]Appellant's Brief, p. 40.
[36]*The Anna O'Boyle*, 122 F. (2d) 286 (CCA 2nd, 1941).
[37]*In re Moran*, 120 Fed. 556 (1903).
[38]Ibid.

them no chance to protest before he cut the towline (R. 57). Thereafter, they were on his vessel, he was captain, his mind was made up (R. 152-3), and argument on their part would have been useless.

John Cho's action in allowing his unseaworthy sampan to be taken in tow in no way contributed to the loss of the vessel because after the unseaworthiness had spent its force the ship could have been towed safely to Honolulu had it not been precipitously abandoned (R. 27). Appellant has failed to prove any contributing fault on the part of the sampan's crew. The district court's finding that the negligent abandonment of the tow was the sale cause of its loss should be sustained as amply supported by the evidence taken before him.

II. THE TUG KOLO IS LIABLE FOR THE NEGLIGENCE OF HER MASTER.

A. The authority of the master is immaterial.

The record presents no question concerning the lawful possession of the Kolo by Joseph Kahiapo as its master. The authority of Kahiapo to take the Tenyo Maru in tow to Honolulu is questioned, however, and it is asserted that John Cho, owner of the Tenyo Maru, should have known of such lack of authority. It is then contended that the tug Kolo cannot be held liable *in rem* for the maritime tort of negligent towage during an unauthorized tow.

It has long been recognized in American admiralty law that a ship is

> a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible . . .[39]
>
> she acquires a personality of her own; becomes competent to contract and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents.[40]

Justice Story said, in construing a statute making the vessel responsible for an offense of piracy, that the vessel is treated in admiralty as the offender without regard to the personal responsibility of the owner.[41]

This personification of the ship as the juristic person, the offending thing, differs radically from the view taken by the English admiralty courts wherein it is held that the ship is not responsible in admiralty where the owner would not be at common law.[42]

Implementing this theory, the Supreme Court has held that a maritime lien may be enforced against a ship for negligent navigation even though the ship were under the control of a pilot whom the owner

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[39]*Canadian Aviator, Ltd. v. U.S.*, 324 U.S. 215, 224 (1945).

[40]*Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902).

[41]*U.S. v. The Brig Malek Adhel*, 2 How. (15 U.S.) 210, 233 (1844).

[42]*Homer Ramsdell Transp. Co. v. La Campagnie General Transatlantique*, 182 U.S. 406 (1901); *The William H. Bailey*, 103 Fed. 799 (1900).

was required by law to put into command at the time the negligence occurred.[43]

In an earlier case under the embargo act, a vessel was proceeded against *in rem* because her master had filed a false report. In answer to the owner's argument that the master acted without authority, Marshall, C. J., said:

> But this is not a proceeding against the owner; it is a proceeding against the vessel, for an offense committed by the vessel which is not less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner.[44]

Similarly, a vessel under charter to a person who furnished his own master and crew is nevertheless subject to a maritime lien for tortious conduct while under the charter.[45]

Even an intentional act of harm done by one ship to another through the spite of her master will render the first ship liable *in rem* despite the obvious lack of authority of the master to do the act. Thus where a tug master intentionally damaged another vessel by coming close aboard and blowing his boilers, the ship was held liable.[46]

The court replied to the owner's contention that the ship should not be held for the unauthorized, inten-

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[43]*The China*, 7 Wall. (74 U.S.) 53 (1868); this is the leading case on the question of the vessel's liability where there would be none on the owner.

[44]*The Little Charles*, 26 Fed. Cas. 979, 982, No. 15,612 (1818).

[45]*The Barnstable*, 181 U.S. 464 (1901).

[46]*The Bulley*, 138 Fed. 170 (1905); but the vessel is not held for punitive damages; *The William H. Bailey*, supra.

tional and malicious action of her master, by conceding that—

> Under the law of master and servant there might be much to sustain the claimant's position, as it is admitted that the act was a wilful one of some person on the tug, not within the scope of his employment, yet under the maritime law it seems to be well settled that a vessel committing a tort is liable therefor, notwithstanding an unauthorized act on the part of some person on board.[47]

Negligent towage is a maritime tort in American admiralty law. It gives rise to a maritime lien which receives the same priority and is treated in all respects like a maritime lien arising in a collision case.[48]

Appellant concedes the above principles but suggests that since "the background of the case is contractual",[49] admirality principles applicable to contract situations should be used to determine the instant case.

But the liabilities in negligent towage have often been said to arise out of independent duties of care and skill resulting from the tower-towed relationship irrespective of the existence or nature of any towage contract. So the tug will be liable for negligent towage even though the contract of towage specifies that

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[47] *The Bulley*, supra, p. 171; the court cited *The John G. Stevens*, infra, the leading case on negligent towage, in support of this proposition.

[48] *The John G. Stevens*, 170 U.S. 113 (1898).

[49] Appellant's Brief, p. 24.

the vessel was being towed at her own risk,[50] or indeed if there is no towage contract at all.[51]

In a case involving towage similar to *The China, supra,* it was held that a tug operating under the directions of a harbor master who had full control and who was not under the control or authority of the owner of the tug should nevertheless be held liable for negligent towage.[52] So also, a vessel taken in tow without charge by the master can hold the tug for negligent towage.[53]

The above authorities make it clear that the liability *in rem* of a vessel for maritime torts exists irrespective of the authority of the crew of the vessel to engage in the operation out of which the tort arose. This is true whether the tort is negligent or wilful, and, we submit, is as true for the tort of negligent towage as for any other wrong.

Appellant cites three cases said to create an exception to the general rule, to the effect that a tow cannot hold her tug for negligent towage if her owner or master knows or should have known that the towage was undertaken without authority. The leading case for this proposition is *The R. F. Cahill,* decided by Federal Judge Batchford in 1878.[54] There the evidence showed that the master had no authority to

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[50]*The Steamer Syracuse,* 12 Wall. (79 U.S.) 167 (1870).
[51]*The Temple Emery,* 122 Fed. 180 (1903).
[52]*Rice v. The Marion A. C. Mesick,* 148 F. (2d) 522 (1945).
[53]*King v. Red Star Towing and Transportation Co.,* 48 F. (2d) 633 (1931).
[54]20 Fed. Cas. 627, No. 11,735; 9 Ben. 352 (1878).

make the tow, and that the tow's owner knew this to be true. The court stated as its guiding principle:

> The act of the servant must be done in the course of his employment, in order to make his master liable civilly for the tortious or negligent act of the servant. (p. 628.)

This is a plain statement of the rule of *respondeat superior* not applicable to admiralty proceedings *in rem ex delicto*.[55] In support thereof, the court cited *inter alia* a personal injury case wherein a stockholder of a railroad riding as a guest sued the railroad for personal injuries and it was held that the doctrine of *respondeat superior* rendered the railroad liable for the negligent act of its servants in the course of their employment.[56]

In *The Andrew J. White*[57] the tug master and tow owner both knew that the master has been forbidden to enter a slip to pick up the tow. Without citing any authorities, the court held that this limited the otherwise general authority of the master to bind the vessel.[58] Believing an authorized contract to be necessary[59] the court then determined that the tug was not liable.

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[55]"*Respondeat Superior in Admiralty*", 19 Harv. L. Rev. 445; see p. 447, "A careful perusal of the authorities above referred to cannot fail to convince anyone that the liability *in rem ex delicto* in the admiralty has no connection with the law of master and servant or with the maxim respondeat superior."

[56]*Philadelphia & Reading R. Co. v. Derby*, 14 How. (20 U.S.) 291 (1852).

[57]108 Fed. 685 (1901).

[58]See *Story on Agency*, 9th ed., Sec. 116 et seq.

[59]Contrary to *The Temple Emery* and *The Steamer Syracuse*, supra.

In *The Oceanica*[60] the third of appellant's three cases, the question was whether the towing contract could relieve the tug of responsibility for negligently causing damage to the tow. The court held that it could, distinguishing and refusing to follow *The Syracuse*[61] in order to reach this result. The court's view that *in rem* liability is dependent upon and limited by the contract was thus manifested.[62] It was then argued on rehearing that since the tug had taken the tow beyond the original destination stated in the contract, the contract limitation should not apply, but the court said that the owner of the tow knew that the tug was unauthorized to continue so that either there was a contract and the limitation applied or there was not, the deviation was unauthorized, and the tug was not liable. The only cases cited were *The R. F. Cahill* and *The Andrew J. White, supra.*[63]

The foregoing three cases have never been cited in any other admiralty action. We submit that they are clearly erroneous and contrary to the great weight of American admiralty authority and should not be considered by this court.

Appellant argues that Federal statute has limited the creation of maritime liens and infers that such

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[60]170 Fed. 893 (CCA 2nd, 1909).

[61]12 Wall. (79 U.S.) 164, supra.

[62]The doctrine of *The Syracuse* was reaffirmed by the Supreme Court in *Compania de Navigacion Interior S. A. v. Fireman's Fund Insurance Company*, 277 U.S. 66 (1928), at p. 73.

[63]See lower court opinion, *The Oceanica*, 144 Fed. 301 (1906), for what we consider a sounder disposition of this case. Note that lower court finds as a fact that the owner of the tow knew of no limitation on the tug master's authority and that this finding was ignored on appeal.

limitation should be judicially extended as a matter of public policy.[64]

However, the Federal Maritime Lien Act,[65] instead of limiting maritime liens, greatly increased the number of occasions when they would arise by creating them in favor of supplier in the domestic port of a ship, whereas formerly they were available only to suppliers in foreign ports.[66]

The public policy of this statute stands in favor of the maritime lien as a suitable and proper means of assuring payment to persons furnishing supplies to or suffering damage from the actions of a ship.

If this were an action *in personam,* the arguments of appellant relating to the master's authority would have merit. Being an *in rem* proceeding, however, with the tug Kolo shown to have been acting in her owner's service, even if not authorized to do so, we submit that the authority of her master is immaterial and that the tug Kolo should be held liable as the wrong-doing vessel pursuant to traditional admiralty doctrines.

B. Appellee did not know of any lack of authority on the part of the master.

The cases relied upon by appellant stress the collusion between owner of the tow and master of the tug and the knowing and deliberate flouting of the

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[64]Appellant's Brief, p. 23.

[65]Act of June 23, 1910, 36 Stat. 604, as amended by Act of June 5, 1920, 41 Stat. 1005; 46 U.S.C., Secs. 971-975.

[66]*The Little Charley*, 31 F. (2d) 120, 122 (1929); cf. Anno. 70 L.R.A. 356, 411.

instructions issued to the master of the tug by her owner.

Appellant not only urges the application of a novel and discredited theory, but asks the court to expand the theory in the application. In *The R. F. Cahill*[67] the court found

> that the libellant know that the limit of towing was Fifty-first Street and promised the master of the tug that he would pay him extra if he would take the canal boat from Fifty-first Street to Fifty-seventh Street, and that he would keep the fact concealed from the owners of the tug . . . (p. 628).

In *The Andrew J. White*[68] the court described the situation that

> the captain of the Minnie knew that the owner of the tug declined to have the tug draw the barkentine out of the slip, and that the master of the tug, in undertaking the office, assumed to do an act which the owner had declined specifically to allow him to do. (p. 688.)

The Oceanica[69] shows the same assumption by the court:

> the owners of the barge knew that the contract was to tow simply to Buffalo.

This knowledge on the part of the tow owner is clearly not present in the record in this case. The master of the Kolo told appellee that he could tow

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[67]20 Fed. Cas. 627, No. 11,735; 9 Ben. 352 (1878).
[68]108 Fed. 685, 688 (1901).
[69]170 Fed. 893, 897 (1909).

the sampan to Honolulu (R. 81). The captain of the tug thought he was authorized to make the tow to Honolulu, and, in fact, had good reason for wanting to do so (R. 121, 122, 127). He told his fellow tug master that he was going to make the tow (R. 135, 139) and he received no contrary instructions (R. 139).

Despite this infirmity in its authorities, appellant argues that the Kolo would not be liable if John Cho should have known or had notice of the lack of authority of her master.

This view would clearly require an existing, valid towage contract as a prequisite to recovery for towage contrary to the express holdings of the Supreme Court.[70] For if John Cho had no knowledge or notice of a deficiency in the authority of the master of the Kolo, then the towage contract would certainly bind Young Brothers.[71] We submit that the attempted extension of the foregoing three cases to to preclude recovery where there is notice of lack of authority, as well as where there is actual knowledge and bad faith, is clearly erroneous.

C. The towage contract made by the master of the tug Kolo with the owner of the Tenyo Maru effectively bound the owner of the tug.

The district court made no finding with respect to appellee's knowledge of the lack of authority of the

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[70] *The Quickstep*, 9 Wall. (76 U.S.) 665, 670 (1869); *The Syracuse*, 12 Wall. (79 U.S.) 167 (1870).

[71] *Story on Agency*, 9th ed., Sec. 116, p. 129; *Restatement, Agency*, Sec. 161.

master of the Kolo (R. 291). He found that the tug master had no express authority.

The master of a ship has the power to bind his principal by entering into all contracts belonging to the ordinary employment of the ship.[72] John Cho, appellee, had no notice of any limitation on the authority of the Kolo's master. Such notice cannot be found in the remark made by the master of the Mahoe to Cho to call Young Brothers to make arrangements for a tow to Honolulu (R. 233) because the master of the Kolo subsequently told Cho that he already had that authority (R. 141). The instructions to Kahiapo, master of the Kolo, to do the best he could for the sampan (R. 123) and to salvage the vessel (R. 127) reasonably interpreted mean to take the vessel off the reef and to a port where adequate repair facilities existed (R. 257). In any event, such instructions were ambiguous and Young Brothers is bound by Kahiapo's reasonable interpretation of them.[73]

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[72]*Story on Agency*, 9th ed., Sec. 116, p. 129.
[73]*Restatement, Agency*, Sec. 44.

CONCLUSION.

For the reasons set forth above, we ask that the judgment of the District Court for the Territory of Hawaii be affirmed.

Dated, Honolulu, Hawaii,
February 15, 1950.

Respectfully submitted,
J. GARNER ANTHONY,
WILLIAM F. QUINN,
Proctors for Appellee.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.